

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

MATTHEW BLISS and HEATHER  
BLISS, husband and wife,

Plaintiffs,

v.

UTLS DEFAULT SERVICES - WA,  
INC., et al.,

Defendants.

CASE NO. C12-5610 BHS

ORDER GRANTING  
DEFENDANTS' MOTION TO  
DISMISS AND PLAINTIFFS'  
LEAVE TO AMEND

This matter comes before the Court on Defendants Bank of New York Mellon ("BONY") and Mortgage Electronic Registration Systems, Inc.'s ("MERS") (collectively "Defendants") motion to dismiss (Dkt. 6). The Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file and hereby grants the motion for the reasons stated herein.

**I. PROCEDURAL HISTORY**

On June 15, 2012, Plaintiffs Matthew and Heather Bliss ("Blisses") filed a complaint against numerous defendants, including BONY and MERS, in the Pierce

1 County Superior Court for the State of Washington. Dkt. 1, ¶ 1. The Blissés assert  
2 claims for intentional misrepresentation; negligent misrepresentation; negligence;  
3 violations of the Washington Consumer Protection Act, RCW Chapter 19.86 (“CPA”);  
4 declaratory relief; injunctive relief; and an accounting. Dkt. 1, Exh. B.

5 On July 17, 2012, Defendants filed a motion to dismiss. Dkt. 6. On July 25, 2012,  
6 Defendant UTLS Default Services – WA, Inc. (“UTLS”) joined Defendants’ motion.  
7 Dkt. 11. On August 20, 2012, the Blissés responded. Dkt. 14. On August 24, 2012,  
8 Defendants replied. Dkt. 15.

## 9 **II. FACTUAL BACKGROUND**

10 On September 19, 2006, the Blissés obtained certain real property in Tacoma, WA  
11 (“Property”) for ten whole dollars. Dkt. 16, Exh. A (“Statutory Warranty Deed”). On  
12 September 21, 2006, the Blissés signed an Adjustable Rate Note borrowing \$324,720  
13 from First Horizon Home Loan Corporation (“First Horizon”). *Id.*, Exh. B. The Blissés  
14 also signed a Deed of Trust securing the Property. *Id.*, Exh. C.

15 In March of 2012 UTLS filed a Notice of Trustee Sale setting a sale date of June  
16 15, 2012. Complaint, ¶ 47. The Blissés allege “that First Horizon promised them a loan  
17 modification when they had no intention of granting one and, further that they had no  
18 right to negotiate with them for a loan modification.” *Id.*, ¶ 48.

## 19 **III. DISCUSSION**

### 20 **A. Standard**

21 Motions to dismiss brought under Rule 12(b)(6) of the Federal Rules of Civil  
22 Procedure may be based on either the lack of a cognizable legal theory or the absence of

sufficient facts alleged under such a theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). Material allegations are taken as admitted and the complaint is construed in the plaintiff's favor. *Keniston v. Roberts*, 717 F.2d 1295, 1301 (9th Cir. 1983). To survive a motion to dismiss, the complaint does not require detailed factual allegations but must provide the grounds for entitlement to relief and not merely a "formulaic recitation" of the elements of a cause of action. *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007). Plaintiffs must allege "enough facts to state a claim to relief that is plausible on its face." *Id.* at 1974.

In the event the court finds that dismissal is warranted, the court should grant the plaintiff leave to amend unless amendment would be futile. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003).

## **B. Defendants' Motion**

Defendants and UTLS move to dismiss all of the Blisses' claims with prejudice and without leave to amend. The Court will address each claim in turn.

### **1. Intentional Misrepresentation**

The Blisses assert a claim for intentional misrepresentation (Complaint, ¶¶ 49–53), which they refer to as "fraud" in their response (Dkt. 14 at 7). A plaintiff must plead all nine elements of a fraud claim: (1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it should be acted upon by plaintiff; (6) plaintiff's ignorance of its falsity; (7) reliance on the representation; (8) plaintiff's right to rely upon it; and (9) actual harm. *See e.g., Stiley v. Block*, 130 Wn.2d 486, 505 (1996). These nine elements must be pled with particularity,

1 which requires that the pleading apprise defendant of the facts giving rise to the fraud  
2 allegation. *Adams v. King Co.*, 164 Wn.2d 640, 662 (2008).

3 In this case, the Blissess fail to plead fraud with particularity. It can hardly be  
4 contested that, in the three paragraphs supporting the fraud claim (Complaint, ¶¶ 50–52),  
5 the Blissess have set forth requisite facts to support all nine elements of fraud or properly  
6 apprise Defendants of the claim. The Court, however, cannot determine whether any  
7 amendment would be futile. Therefore, the Court grants Defendants’ motion and the  
8 Blissess leave to amend their fraud claim.

## 9 **2. Negligent Misrepresentation**

10 To establish a negligent misrepresentation claim, a plaintiff must show that the  
11 defendant negligently supplied false information the defendant knew, or should have  
12 known, would guide the plaintiff in making a business decision, and that the plaintiff  
13 justifiably relied on the false information. *Van Dinter v. Orr*, 157 Wn.2d 329, 333  
14 (2006).

15 In this case, the Blissess’ negligent misrepresentation claim is based on  
16 representations allegedly made by First Horizon. Complaint, ¶¶ 55–57. Therefore, the  
17 Court is without authority to dismiss a claim that is not asserted against BONY or MERS.

## 18 **3. Negligence**

19 The Blissess’ negligence claim is supported by allegations that First Horizon did  
20 not have the proper authority to collect and disburse the Blissess’ payments. Complaint,  
21 ¶¶ 60–64. Although the Court is not persuaded that this is a cognizable legal theory, the  
22

1 claim is not asserted against BONY or MERS. Therefore, the Court is without authority  
2 to dismiss a claim that is not properly asserted.

#### 3 **4. CPA**

4 The Blissess' CPA claim is purely labels and conclusions. *See* Complaint, ¶¶ 66-  
5 69. The Court, however, is unable to determine whether any amendment would be futile.  
6 Therefore, the Court grants Defendants' motion and grants the Blissess leave to amend.

#### 7 **5. Declaratory and Injunctive Relief**

8 These types of relief require an underlying claim. It appears that the Blissess'  
9 request for injunctive relief may be based on violations of the Washington Deed of Trust  
10 Act, RCW Chapter 61.24 ("DTA"). *See* Complaint, ¶ 84. The Blissess, however, have  
11 failed to assert a stand-alone DTA claim. Therefore, the Court grants Defendants'  
12 motion to dismiss the Blissess' claims for declaratory and injunctive relief. If the Blissess  
13 properly amend their complaint, then they may be able to seek these types of relief.

#### 14 **6. Accounting**

15 This is a type of relief that requires an underlying violation. Therefore, the Court  
16 grants Defendants' motion and dismisses the Blissess accounting claim.

#### 17 **7. UTLS's Joinder**

18 It appears that the Blissess only assert violations of the DTA against UTLS and  
19 challenge UTLS's authority to foreclose on their home. Although dismissal is proper, the  
20 Court is unable to determine whether any amendment would be futile. Therefore, the  
21 Court dismisses the Blissess' claim against UTLS and grants the Blissess leave to amend.  
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**IV. ORDER**

Therefore, it is hereby **ORDERED** that Defendants' motion to dismiss (Dkt. 6) is **GRANTED**. The Blissess may file an amended complaint consistent with this opinion no later than October 17, 2012.

Dated this 27th day of September, 2012.



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BENJAMIN H. SETTLE  
United States District Judge